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No. ~~2015~~.

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Enrique Flores Magon and
Ricardo Flores Magon,
Plaintiffs in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

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STATEMENT OF THE CASE.

The plaintiffs in error hereinafter called the defendants, were indicted February 18, 1916, with another William C. Owen, for violating that portion of section 211 of the Penal Code which forbids the sending of "indecent" matter through the mails, to-wit, matter of a character tending to incite murder or assassination. Section 211 of the Penal Code was originally enacted by Congress in 1872 as Sec. 3893 R. S. It declared written or printed matter of an obscene, lewd lascivious or other indecent character or anything designed to prevent conception or procure abortion as non-mailable.

By the act of March 4, 1911, it was amended by adding these words: "And the term 'indecent' within the intendment of this section shall include matter of a character tending to incite arson, murder or assassination." As far as known this is the first prosecution under the statute as thus amended. The defendants demurred to the indictment. The demurrer was overruled. They also moved to quash. This motion was denied. They were acquitted on the first count. They were convicted on the second and third. They moved in arrest of judgment. This being denied they were sentenced to prison at McNeil Island, Enrique to three years and Ricardo to one year and a day, and to pay a fine of $1000.00 each on each count. They sued out a writ of error and were released on bail pending the hearing on the writ.

The evidence showed that the defendants were born in Mexico, were educated in the City of Mexico, and have been engaged since reaching manhood, a period of upwards of twenty years, in publishing papers here and in Mexico in opposition to the rule of Porfirio Diaz and his successors in that unhappy country. Enrique admitted that he owned the newspaper "Regeneration" and printed and published the same at Los Angeles, containing the alleged non-mailable matter set out in the indictment and Ricardo admitted that he was a writer on such newspaper and wrote the objectionable articles.

The indecent matter alleged in the second count, written by the defendant Ricardo Magon in Spanish and printed in Spanish in Regeneration September

25, 1915, translated into English is as follows [Tr. pp 9, 10, 66, 70]:

"Justice, and not bullets is what ought to be given to the revolutionists of Texas, and from now on we should demand that those persecutions to innocent Mexicans should cease, and as to the revolutionists, we should also demand that they be not executed (shot).

"The ones who should be shot are the 'rangers' and the band of bandits who accompany them in their depredations.

* * * * * * * * *

"Enough of reforms! What we hungry people need is entire liberty based on economic independence. Down with the so-called rights of private property, and as long as this evil right continues to exist we shall continue under arms. Enough with mockery! Poor people, whoever speaks to you about Carranzismo, spit in their face and break their jaws.

"Long live land and liberty!"

The indecent matter alleged in the third count, written by the defendant Ricardo Magon in Spanish and printed in Spanish in Regeneration November 6, 1915, was addressed "To Carrancista Soldiers." The gist of it translated into English is as follows [Tr. pp. 14, 16, 74, 75, 76]:

"So you see, brother Carrancistas, the problem which is going to be solved by the rebels who retain their arms, when Carranza becomes president, is the same problem that you will have to decide because it affects you in the same manner. Your duty is to help and for this purpose do not surrender your arms when

the troops are ordered disbanded. What you should do at such a time, or before, if possible, is to rebel, turn your arms against your chiefs and officers and without trembling pulse open fire with your rifles, because they are your enemies, and are concerned in having these conditions last forever, so they can have a life of privilege.

"A strong heart, a firm pulse and steady aim is all you need to exterminate your immediate oppressors.

"If you surrender your arms you will return to your home in poverty, ready to sell your blood and strength to the rich at their own price.

"We, the disinherited, must rid ourselves of those who are in our way, if we can, by hook or crook, the same as we get rid of the tiger, as we annihilate the ratttlesnake, as we scrunch the tarantula. Those who tell you that they are not prepared for this or other conquests which benefit you are the ones who have interest in delaying your emancipation so that in the meantime they can live at your expense."

SPECIFICATIONS OF ERROR.

1. The facts stated in the second count do not constitute an offense.

2. The facts stated in the third count do not constitute an offense.

3. The statute is void for uncertainty under the well-known maxim: *"Ubi jus incertum, ibi jus nullum,"* and the indictment is therefore void for uncertainty.

4. It is not competent for Congress to make any law under subdivision 7 of Sec. VIII of Art. 1 of the constitution infringing the first amendment.

5. It is not competent for Congress to say that the word "indecent" as used in Sec. 211 P. C. shall comprehend matter of a character tending to incite murder or assassination.

6. The matters and things set out in the second and third counts as having been printed and published in Regeneration are not of a vile or filthy or indecent character nor of a character tending to incite murder or assassination.

7. The indictment does not allege that the objectionable matter was non-mailable.

8. The indictment does not allege that the newspaper or newspapers containing the indecent matter were addressed to any person or persons whomsoever, nor that the names of such persons were unknown to the grand jury.

9. The indictment does not allege that the defendants, or either of them, knew that said newspapers so mailed contained indecent or vile or filthy matter or matter tending to incite murder or assassination, nor that the defendants, or either of them, were the owners or managers or editors or publishers of such newspaper from which it could be inferred that they knew such matter was indecent or vile or filthy or of a character tending to incite murder or assassination.

10. The term "indecent," as defined by Congress by the amendment of March 4, 1911, applies only to matter of a character tending to incite arson, murder or assassination among those whose minds are open to such influences and there is no allegation that the alleged indecent matter was addressed to any such person or persons, nor that it tended to incite murder

or assassination, but only that such matter "was of a character tending to incite in the minds of persons reading the same murder and assassination."

11. The court erred in sustaining the objection of the Government to the following question propounded to the defendant Enrique Flores Magon, upon direct-examination, to-wit: "At the time you deposited, or caused to be deposited in the mail, the alleged non-mailable matter set out in the second and third counts of the indictment, did you know such matter to be of a character tending to incite murder or assassination?"

12. The court erred in sustaining the objection of the Government to the following question, propounded to the defendant Enrique Flores Magon, in direct examination, to-wit: "At the time that you deposited, or caused to be deposited in the mail objectionable matter set out in counts two and three of said indictment, did you intend to deposit in the mail the indecent matter, that is to say, matter of character tending to incite murder or assassination?"

13. The court erred in instructing the jury that one who writes non-mailable matter for a newspaper, being neither its editor, manager, owner or publisher, is criminally responsible for the transmission of such matter through the mails.

14. The court erred in refusing to give to the jury defendants' requested instructions numbers 2, 3, 5, 6, 8, 9, 11 and 12, as found on pages 18, 19, 20, 21, 22 and 23 of the transcript.

BRIEF OF THE ARGUMENT.

I.

The indictment is void for uncertainty in that it charges that the objectionable matter contained in the second and third counts of the indictment is of a character tending to incite in the minds of persons reading the same murder and assassination. This language is too vague to form the basis of a criminal charge involving such heavy penalties.

Schroeder Due Process of Law, 49;
Enterprise, Fed. Cas. No. 4499;
U. S. v. Clayton, Fed. Cas. No. 14814;
Tozer v. U. S., 52 Fed. 917, 919;
Louisville & N. R. Co. v. Railroad Com. of Tenn., 16 Am. & Eng. R. Cas. 15;
Louisville & N. R. Co. v. Com., 35 S. W. 129, 33 L. R. A. 209, 212;
Chicago & C. R. Co. v. Dey, 35 Fed. 866, 1 L. R. A. 744, 750;
Bish. Stat. Cr. Sec. 41;
Sutherland, Stat. Const. 1st ed., 438-9;
U. S. v. Reese, 92 U. S. 219, 221, 23 L. 563, 363;
U. S. v. Sharp, Fed. Cas. No. 16264;
U. S. v. Traction Co., 34 App. Cas. (D. C.) 592;
Czarra v. Medical Supers., 25 App. Cas. (D. C.) 443;
McJunkins v. State, 10 Ind. 145;
Ex parte Andrew Jackson, 45 Ark. 164;
U. S. v. Commerford, 25 Fed. 904;

2 Hughes Procedure, 1003;
1 The Spirit of the Law, 232, Aldine ed.;
King v. Dean of St. Asaph, 3 Terms Rep. 431.

II.

The indictment is bad because:

a. It does not allege that the objectionable matter was non-mailable, nor that

b. It was addressed to any person or persons whomsoever to be delivered through the mails, nor that

c. The defendants knew it to be non-mailable.

U. S. v. Brazeau, 78 F. 464;
U. S. v. Hess, 124 U. S. 483, 31 L. 516;
Evans v. U. S., 153 U. S. 584, 38 L. 830;
U. S. v. Taylor, 37 F. 200;
Goode v. U. S., 159 U. S. 671;
Sec. 5467, 5 Fed. Stat. 839;
Durland v. U. S., 161 U. S. 306, 314, 40 L. 709, 712;
U. S. v. Green, 136 F. 641;
Hughes, Fed. Proc. p. 38;
U. S. v. Fero, 18 F. 901;
Peters v. U. S., 94 F. 127, 36 C. C. A. 105;
Cochran v. U. S., 157 U. S. 286, 39 L. 704;
U. S. v. Cruikshank, 92 U. S. 542, 23 L. 588;
U. S. v. Harris, 122 F. 551;
U. S. v. Clifford, 104 F. 296;
2 Hawk, P. C. p. 323, Sec. 60;
State v. Foster, 3 McCord 442;
Republica v. Foyer, 3 Yeates 451;
U. S. v. Bebout, 28 F. 522;

U. S. v. Slenker, 32 F. 691;
U. S. v. Clifford, 104 F. 296;
U. S. v. Carll, 105 U. S. 611, 26 L. 1135;
U. S. v. Cruikshank, 92 U. S. 542, 23 L. 588;
Corn v. Boynton, 12 Cush 499;
Com. v. Young, 15 Grat. 664;
U. S. v. Reid, 73 F. 289;
Rosen v. U. S., 161 U. S. 29, 40 L. 607;
1 Jones Evidence, Sec. 167;
1 Bish. Crim. Proc. Sec. 1184;
Kerrains v. People, 69 N. Y. 101;
U. S. v. Stone, 8 F. 232;
12 Cyc. 403.

III.

That the indictment does not state facts sufficient to constitute an offense and that the defendants could not have known that the language used by them was indecent or of a character tending to incite murder or assassination. [Tr. pp. 60 to 75, inclusive; Tr. pp. 48 to 60, inclusive.]

IV.

It is not competent for Congress to enact any law under subdivision 7 of Sec. 8 of Art. I of the constitution, infringing the first amendment.

Reynolds v. U. S., 98 U. S. 163, 25 L. 249;
Scott v. Sandford, 19 How. 393, 15 L. 691;
Gulf etc. Ry. Co. v. Ellis, 165 U. S. 160, 41 L. 670.

THE ARGUMENT.

I.

The Indictment Is Bad for Uncertainty.

There ought to be absolute certainty in the definition of that which is penalized. Wherever the interpretation, construction and application of a penal statute are left to the judge or to the jury for want of a definition of the thing prohibited, for lack of definite criteria of guilt, such statute is void for uncertainty. The case at bar affords a fine example. The learned trial judge who heard the demurrer held that the first count as well as the second and third contained matter of a character tending to incite murder or assassination. The jury held that the first count was not of a character to incite murder or assassination.

> "The rule by which such statutes must be annulled is this: that every statute penal in character is void for uncertainty unless the prohibited conduct and criteria of guilt are defined in the statute by words so fixed and certain in meaning as to leave no reasonable doubt or difference of opinion in the minds of men of ordinary intelligence as to what is prohibited or as to the consequence of applying the statutory criteria of guilt to every given state of facts. If the statutory test of criminality is uncertain and therefore left to be judicially supplied so that in a given case a uniform conclusion is not unavoidably reached by different courts acting upon the same state of facts, which uniformly must be reached solely by accurate, unavoidable and uniform deduction made from the statutory tests of criminality (not by

tests judicially created) then the statute is a nullity."

Schroeder Due Process of Law, 49.

To pass the question up to 12 men in the jury box to say whether certain words such as are contained in the second and third counts tend to incite to murder or assassination is to violate every principle by which we have conceived our most precious liberties to be safeguarded, and no less imperils freedom than when the same question is left to the discretion of the judge.

In May and June, 1916, when this case was tried this country was on the verge of war with Mexico and the president had sent an expeditionary force across the border to capture Villa dead or alive. There was much feeling in this country against Mexicans. Who can say, with no criteria of guilt prescribed in the statute, to what extent the jury was unconsciously moved by the outrages on our border, to adjudge the defendants guilty? Another jury in less troublous times might have said "Not guilty," and in either case by what legal standard could it be adjudged that one verdict was right and the other wrong? *Ubi jus incertum, ibi jus nullum.*

> "For although ignorance of the existence of a law be no excuse for its violation, yet, if this ignorance be the consequence of an ambiguous or obscure phraseology some indulgence is due to it. It should be a principle of every criminal code, and certainly belongs to ours, that no person be adjudged guilty of an offense unless it be created and promulgated in terms which leave no reasonable doubt of their meaning. * * * A

court has no option where any considerable ambiguity arises on a penal statute, but is bound to decide in favor of the party accused."

Enterprise, Fed. Cas. No. 4499.

"The courts have no power to create offenses, but if by a latitudinarian construction they construe cases not provided for to be within legislative enactment, it is manifest that the safety and liberty of the citizen are put in peril, and that the legislative domain has been invaded. * * * The doctrine is fundamental in English and American law that there can be no constructive offenses; that before a man can be punished, his case must be plainly and unmistakably within the statute; that if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused. These principles admit of no dispute, and often have been declared by the highest courts, and by no tribunal more clearly than the Supreme Court of the United States."

U. S. v. Clayton, Fed. Cas. No. 14814.

"In order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty."

Tozer v. U. S., 52 Fed. 917, 919.

Courts have uniformly held penal statutes void for uncertainty, not due process of law, and therefore unconstitutional when it was left to judge or jury to construe such terms and phrases as "fair and just return" or "just and reasonable rate of toll or compen-

sation" and to determine the defendants' guilt under statutes penalizing transportation companies for charging too much in the transportation of passengers or freight. In a leading case the Court of Appeals of Kentucky referred to the Tozer case with approval and said:

> "That this statute leaves uncertain what shall be deemed a 'just and reasonable rate of toll or compensation' cannot be denied; and that different juries might reach different conclusions, on the same testimony as to whether or not an offense has been committed, must also be conceded. That criminality of the carrier's act, therefore, depends on the jury's view of the reasonableness of the rate charged, and this latter depends on many uncertain and complicated elements. That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct. And it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law, which may be known in advance, but on one erected by a jury; and especially so, as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can

be known until after the commission of the crime.

"If the infliction of the penalties prescribed by the statute would not be the taking of property without due process of law, and in violation of both state and federal constitutions, we are not able to comprehend the force of our organic laws. In Louisville & N. R. Co. v. Railroad Com. of Tenn., 16 Am. & Eng. R. Cas. 15, a statute very similar to the one under consideration was thus disposed of by the learned judge (Baxter): 'Penalties cannot be thus inflicted at the discretion of a jury. Before the property of a citizen, natural or corporate, can be thus confiscated, the crime for which the penalty is inflicted must be defined by the law-making power. The legislature cannot delegate this power to a jury. If it can declare it a criminal act for a railroad corporation to take more than a "fair and just return" on its investments it must, in order to the validity of the law, define with reasonable certainty what would constitute such "fair and just return." The act under review does not do this, but leaves it to the jury to supply the omission. No railroad company can possibly anticipate what view a jury may take of the matter, and hence cannot know, in advance of a verdict, whether its charges are lawful or unlawful. One jury may convict for a charge made on a basis of 4 per cent, while another might acquit an accused who had demanded and received at the rate of 6 per cent, rendering the statute, in its practical working, as unequal and unjust in its operation as it is indefinite in its terms.' When we look on the other side of the question, we find the contention of the state supported by neither reason or authority. No case

> can be found, we believe, where such indefinite legislation has been upheld by any court when a crime is sought to be imputed to the accused."
>
> Louisville & N. R. Co. v. Com., 35 S. W. 129, 33 L. R. A. 209, 212.

Just as in the case at bar different juries would have different opinions as to what language in a newspaper article would tend to incite to murder or assassination, so in these rate cases different juries would have different opinions as to what was a fair and reasonable rate. And the learned Judge Hazelrigg in the case last cited further says:

> "In such case it may be seen different persons have different opinions as to what is a fair and reasonable rate. Courts and juries too would differ, and at one time or place a defendant might be convicted and fined in a large amount for the same act, which, in another place or at another time, would be held to be no breach of the law, and what might be thought a fair and reasonable rate on one road might be thought otherwise upon another road. There would be no certainty of being able to comply with the law. A railroad corporation, with the purpose of conforming to the law, might fix its rates at what it believed to be reasonable, and yet be subjected to the heavy penalties here prescribed."

In one of the early rate cases arising in Iowa in 1888, the statute imposed heavy penalties without clearly defining the offenses.

Mr. Justice Brewer said:

> "The contention of complainant is that the substance of these provisions is, that if a railroad

company charges an unreasonable rate, it shall be deemed a criminal, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what in fact is, or what any jury will find, to be a reasonable charge. If this were the construction to be placed upon the act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and may not do under it."

The learned justice then remarks:

"That it is impossible to dissent from the doctrine of Lord Coke that acts of parliament ought to be plainly and clearly, and not cunningly and darkly, penned, especially in legal matters."

He then refers to the Chinese Penal Code which reads:

"Whoever is guilty of improper conduct and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least 40 blows; and when the impropriety is of a serious nature with 80 blows," adding "There is very little difference between such a statute and one which would make it a criminal offense to charge more than a reasonable rate."

Chicago & C. R. Co. v. Dey, 35 Fed. 866, 1 L. R. A. 744, 750.

And with propriety may we not remark also that there is very little difference between the Chinese statute and our section 211 P. C., leaving it to a jury to say what words upon paper, what language in writing *tends to incite* murder or assassination. The notable

difference is that the Chinese law deals with a trifling misdemeanor involving an extreme penalty of 80 blows, while under our statute the unhappy accused may suffer imprisonment for five years and be fined $5,000.

> "Where the statutory terms are of such uncertain meaning or so confused that the courts cannot discern with reasonable certainty what is intended they will pronounce the enactment void."
>
> Bish. Stat. Cr. Sec. 41.

> "The penal law is intended to regulate the conduct of people of all grades of intelligence within the scope of responsibility. It is therefore essential to its justice and humanity that it be expressed in language which they can easily comprehend, that it be held obligatory only in the sense in which all can understand it, and this consideration presses with increasing weight according to the severity of the penalty. Hence every provision affecting any element of a criminal offense involving life or liberty is subject to the strictest interpretation. * * * It is the legislature, not the court, which is to define a crime and ordain its punishment."
>
> Sutherland, Stat. Const., 1st ed., 438-9.

Edward Livingston was one of the greatest lawyers, jurists and statesmen of this time. He was secretary of state under Jackson, minister to France, and United States senator.

In 1821 he was employed by the state of Louisiana to draft a Penal Code. Sir Henry Maine pronounced him "the first legal genius of modern times." In 1822, speaking of the times of Jeffreys, he said:

This dreadful list of judicial cruelties was increased by the legislation of the judges who declared acts, which were not criminal under the letter of the law, to be punishable by reason of its spirit. The statute gave the text and the tribunals wrote the commentary in letters of blood, and extended its penalties by the creation of constructive offenses. The vague, and sometimes unintelligible language, employed in the penal statutes, gave a color of necessity to this assumption of power, and the English nation have submitted to the legislation of its courts, and seen their fellow subjects hanged for constructive felonies, quartered for constructive treason, and roasted alive for constructive heresies, with a patience that would be astonishing, even if their written laws had sanctioned the butchery. The first constructive extension of a penal statute beyond its letter, is an *ex post facto* law, as regards the offense to which it is applied, and is an illegal assumption of legislative power, so far as it establishes a rule for further decisions. In our republic, where the different departments of government are constitutionally forbidden to interfere with each other's functions, the exercise of this power would be particularly dangerous. * * * It may be proper to observe that the fear of these consequences is not ideal, and that the decisions of all tribunals under the common law justify the belief that without some legislative restraint our courts would not be more scrupulous than those of other countries, in sanctioning this dangerous abuse.. It is better that acts of an evil tendency should for a time be done with impunity than that courts should assume legislative powers, which assumption is itself an act more injurious than

any it may purport to repress. There are therefore no constructive offenses. Penal laws should be written in plain language, clearly and unequivocally expressed, that they may neither be misunderstood or perverted."

In a leading case Chief Justice Waite said:

"If the legislature undertakes to define by statute a new offense and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime. * * * It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the court to step inside and say who could be rightfully detained, and who should be set at large. This would to some extent substitute the judicial for the legislative department of the government."

U. S. v. Reese, 92 U. S. 219, 221, 23 L. 563, 565.

"Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."

U. S. v. Sharp, Fed. Cas. No. 16264.

"In a criminal statute the elements constituting an offense must be so clearly stated and defined as to reasonably admit of but one construction. The dividing line between what is lawful and unlawful cannot be left to conjecture."

U. S. v. Traction Co., 34 App. Cas. (D. C.) 592; Czarra v. Medical Supers., 25 App. Cas. (D. C.) 443.

Many courts have wrestled in vain endeavoring to define such words as "obscene" and "indecent" in penal statutes. It remained for Congress to apotheosize absurdity by declaring that the word "indecent" shall include matter of a character tending to incite murder or assassination.

The great jurist Edward Livingston, in framing his criminal code above referred to, exclaimed in despair that he had serious thoughts to omit such matters altogether because of the impossibility of defining them and leave them to correction by public opinion.

At an early day the highest court of Indiana in discussing the term "indecency" said:

> "It would therefore appear that the term 'public indecency" has no fixed legal meaning—is vague and indefinite, and cannot in itself imply a definite offense. And hence, the courts, by a kind of judicial legislation, in England and the United States, have usually limited the operation of the term to public displays of the naked person, the publication, sale or exhibition of obscene books and prints, or the exhibition of a monster,—acts which have a direct bearing on public morals, and effect the body of society. Thus it will be perceived that so far as there is a legal meaning attached to the term, it is different from and more limited than the commonly accepted meaning given by Webster to the word indecency. A statute relative to a misdemeanor of the grade and character of this, and prescribing so severe a penalty as the deprivation of liberty by imprisonment, ought to be clearly worded, so as to leave no doubt or ambiguity about its meaning, before it should be construed to include a large and undefined class of offenses

against morality. * * * This statute, under such circumstances, should be in itself explicit, and should not depend for vitality upon another act defining the meaning of words. * * * If the statute is given the broad construction contended for by the prosecution, who is to determine what phrases amount to an offense under it?"

McJunkins v. State, 10 Ind. 145.

In construing the term "obscene" in Sec. 211, Judge Lowell of the Eastern District of Massachusetts said:

"Crime should be so clearly defined that there can be no mistaking it. Murder, homicide, arson, larceny, burglary, forgery, are so defined that they cannot be misunderstood. If obscenity is a crime punishable by fine and imprisonment it ought to be so clearly described that we may know in what it consists, and that accused persons may not be at the mercy of a man, or a number of men who construe what is obscene, indecent or immoral by their own special opinion or notion of morality or immorality. What is obscene to one man may be pure as mountain snow to another. One man should not and cannot decide for other men."

So, in the case at bar, what to one man would tend to incite murder might to another be a perfectly legitimate expression of righteous indignation or a mere ardor of sentiment or at most a verbal indiscretion or only a piece of rant or harmless levity or innocuous braggadocio.

The Supreme Court of Arkansas, construing a statute denouncing "any act injurious to the public health or public morals," said:

> "We cannot conceive how a crime can, or any sound principle, be defined in so vague a fashion. Criminality depends, under it, upon the moral idiosyncrasies of the individuals who comprise the court or jury. The standard of crime would be ever varying, and the courts would constantly be appealed to as the instruments of moral reform, changing with all fluctuations of moral sentiment. The law is simply null. The constitution which forbids *ex post facto laws*, could not tolerate a law which would make an act a crime, or not, according to the moral sentiment which might happen to prevail with the judge or jury after the act had been committed."
>
> *Ex parte* Andrew Jackson, 45 Ark. 164.

Touching an obscenity statute, the United States court for the Western District of Texas has said:

> "We have been taught to believe that it was the greatest injustice toward the common people of Old Rome when the laws they were commanded to obey, under Caligula, were written in small characters, and hung upon high pillars, thus more effectually to insnare the people. How much advantage may we justly claim over the old Romans, if our criminal laws are so obscurely written that one cannot tell when he is violating them? If the rule contended for here is to be applied to the defendant, he will be put upon trial for an act which he could not by perusing the law have ascertained was an offense. My own sense of justice revolts at the idea. I cannot give

it my sanction. * * * The indictment is quashed, and the defendant is discharged."

U. S. v. Commerford, 25 Fed. 904.

"Where the law is uncertain, there is no law." This maxim was born of the solicitude of our fathers to conserve our liberties. Speaking of maxims, a leading law writer says:

"All great judges and writers have been led by maxims. * * * Where the maxims lead and illumine the great ends of jurisprudence have been advanced; constitutions and their implications have been respected. Judges who understand, respect and cite maxims, save great principles from clouds of doubt and miserable equivocation. * * * Nothing more greatly obstructs usurpation, abuse of power and arbitrariness in its edicts than do maxims. * * * Maxims are the condensed good sense of all nations. They are the essence of wisdom in all ages. Whenever the law is the perfection of reason, they are not excluded but they must necessarily be included. Jurisprudence can lay claim to no other element so lustrous, so illuminating and attractive, as its great fundamental maxims."

2 Hughes Procedure, 1003.

And of this particular maxim he says:

"Where the rule is alternating, as antipathy and affection, caprice or whim dictates, there is no law. And so it is where for one of the foundations for a judgment must be one kind of matter, and for another, a different."

It is conceded that Montesquieu was the inspiration of the fathers of the constitution. It is interesting, and we hope not unprofitable, in this connection to note from the voluminous legal literature of that time what he and other distinguished jurists had to say about certainty in penal statutes. Discoursing of treason, and his words aptly apply to such an offense as using language tending to incite murder, Montesquieu said:

> "Nothing renders the crime of high treason more arbitrary than declaring people guilty of it for indiscreet speeches. Speech is so subject to interpretation; there is so great a difference between indiscretion and malice; and frequently little is there of the latter in the freedom of expression, that the law can hardly subject people to a capital punishment for words unless it expressly declares what words they are. Words do not constitute an overt act; they remain only in idea. When considered by themselves, they have generally no determinate signification, for this depends on the tone in which they are uttered. It often happens that in repeating the same words they have not the same meaning; this depends on their connection with other things, and sometimes more is signified by silence than by any expression whatever. Since there can be nothing so equivocal and ambiguous as all this, how is it possible to convert it into a crime of high treason? Wherever this law is established, there is an end not only of liberty, but even of its very shadow."
>
> 1 The Spirit of the Law, 232 Aldine ed.

So Beccaria, one of the greatest of legalists, says:

> "When the rule of right which ought to direct the actions of the philosopher, as well as the

ignorant, is a matter of controversy, not of fact, the people are slaves to the magistrate. If the power of interpreting laws be an evil, obscurity in them must be another, as the former is the consequence of the latter. I do not know of any exception to this general axiom, that every member of society should know when he is a criminal and when innocent. The uncertainty of crimes hath sacrificed more victims to secret tyranny, than have ever suffered by public and solemn cruelty."

Lord Auckland in 1771, writing on the principles of penal law, said:

"It is further essential to political freedom that the laws be clearly obvious to common understanding, and fully notified to the people. * * * When the people first learn the law by fatal experience, they feel as if the judge was in effect legislator, and as if life and liberty were subjected to arbitrary control. * * * The same will be the consequences where the law is imperfectly and indefinitely expressed. The style thereof should be clear, and as concise as is consistent with clearness; general terms also should be particularly avoided, as liable to become the instruments of oppression."

In 1784 a high English court, denouncing uncertainty in the law of libel, said:

"Miserable is the condition of individuals, dangerous is the condition of the state, if there is no certain law (or which is the same thing), no certain administration of law, to protect individuals or to guard the state. * * * Under such an administration of the law no man could tell, no counsel could advise, whether a paper were or were

not punishable. I am glad that I am not bound to subscribe to such an absurdity, such a solecism in politics."

King v. Dean of St. Asaph, 3 Terms Rep. 431.

These citations make it clear that the very essence of the terms "law," "law of the land" and "due process of law," as used in our constitution and in the controling decisions of our Supreme Court is that all discretion of judge and jury in criminal cases is taken away by the very explicitness of the law itself and when that explicitness is lacking the law is uncertain and there is no law. *Ubi jus incertum, ibi jus nullum.*

II.

Technical Defects.

The argument thus far is designed to have application especially to the third specification of error averring uncertainty in the definition of the offense charged. If this contention is sound the indictment fails for uncertainty as it necessarily does not state facts sufficient to constitute an offense, and the argument reaches epecifications of error Nos. 1, 2 and 6 also. Further argument is reserved, however, under the third subdivision hereof bearing upon the point that the objectionable language cannot be construed as of a character to incite murder or assassination under the circumstances of the case and under the constitutional guarantees of the first amendment, and in view of the fact that Congress has no power in regulating the postoffice to infringe freedom of speech or of the press when such freedom is dependent upon the use of the

postoffice and when such freedom would be but a mockery without the use of the mails. We now proceed to a consideration of specifications of error Nos. 7, 8 and 9, points raised in the motion to quash, to-wit, that the indictment does not allege the objectionable matter was non-mailable, nor that it was addressed to any person, nor that the defendants knew it was indecent.

Specification of Error No. 7.

There is no averment in the indictment that the newspapers, or any of them, alleged to have been deposited in the postoffice by the defendants, to be transmitted by the postoffice establishment were addressed to any person or persons nor that the names of the addressees were unknown.

This is a fatal defect and cannot be cured by verdict. An allegation that the newspapers were addressed or that direction was given for mailing or delivery is requisite, not as a matter of description or identification of the unmailable article, but as an averment of an essential ingredient of the offense; and such ingredient is not supplied by the general averment that the newspapers were deposited to be transmitted and distributed by the postoffice establishment to many and divers persons whose names are to the grand jurors unknown.

U. S. v. Brazeau, 78 F. 464.

In the Brazeau case the indictment was under Sec. 3893, as amended by Act of Sept. 26, 1888, charging the defendant with depositing 100 copies of a newspaper containing an obscene article in the postoffice

"for mailing and delivery," but without any averment that such newspapers were addressed to any person or persons whomsoever. The Government claimed that the address is a mere matter of description and that the newspapers were sufficiently identified and described otherwise than by the address, and that the essential ingredients of the offense were sufficiently set forth in the language of the statute. District Judge Brown held against the Government. He said:

> "The rule that an indictment following the words of the statute is sufficient is subject to the qualification that all material facts and circumstances embraced in the definition of the offense must be stated or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication and the charge must be made directly and not inferentially."

Citing:

> U. S. v. Hess, 124 U. S. 483, 31 L. 516;
> Evans v. U. S., 153 U. S. 584, 38 L. 830.

The learned judge further says:

> "The statute does not make criminal the mere depositing in a postoffice of obscene matter. The substance of the offense is the employment of, or the attempt to employ, the mails for the transmission of obscene matter. The depositing prohibited by this statute is depositing 'for mailing and delivery.' There must be a purpose or intent in the act of depositing and an adaptation, apparent at least in the thing deposited to effect that intent. A newspaper without address or direction for de-

> livery is not even apparently capable of effecting that intent. So long as anything remained to be done to make the newspapers a proper subject of deposit in the mail or at least an apparently proper subject of deposit so as to put in motion the postal operations of mailing or delivery, the offense was incomplete."

Citing:

U. S. v. Taylor, 37 F. 200;
Goode v. U. S., 159 U. S. 671, 40 L. 297.

In the Taylor case the defendant was convicted of embezzling a letter under

Sec. 5467, 5 Fed. Stat. 839.

At the trial the court held the delivery of the registry receipt and the payment of the registration fee were sufficient evidence that the thing embezzled was a letter. There was no evidence that the letter was ever stamped or sealed or put in the special envelope used for registered letters. On motion for a new trial the court held it was not a "letter"—that as long as anything remained to be done to render the envelope mailable matter, i. e. a proper subject of deposit in the mail the postmaster was acting merely as the agent of the sender and the envelope was not a letter within the meaning of the statute.

The court further says:

> "The only language which by any possibility can be considered as including an allegation that the newspapers were capable of mailing is the averment that they were deposited 'for mailing and delivery.' But in the case at bar there is not

> even such an allegation in the language of the statute, but only this: That defendants did * * * deposit and cause to be deposited in the postoffice * * * certain mail matter, to-wit, a newspaper containing indecent, vile and filthy substance and language * * * and said newspaper of said indecent character was so deposited and caused to be deposited in the postoffice (not by the defendants, mark you, or either of them) to be transmitted to many and divers persons * * * the names of which divers persons are unknown to the grand jurors, and many copies of said newspapers were so deposited and caused to be deposited (not by the defendants, or either of them) in the postoffice at one time and as one act to be so distributed by said postoffice and delivery respectively a copy each to said many and divers persons."

I may well further adopt the language of the learned Judge Brown and say:

> "But this is not a direct and certain allegation. To give it the required construction, resort must be had to inference and to the illogical inference that because the newspapers were deposited for a certain purpose, they were deposited under such conditions as to be capable of effecting that purpose. Such an inference is not only unsound, but a violation of the rule quoted from U. S. v. Hess, even granting the contention that the address, if added, would be simply additional description of the thing deposited and serve merely for identification. Is not such a description required by the rule that there should be such reasonable particularity in the description as the nature of the case admits? The universal practice

of adding such averments and the well-known course of the operation of the postoffice afford sufficient evidence of the practicability of the description. To sustain this indictment is practically to establish a precedent for the total omission from indictments of this class of any reference to the envelope or address of letters or newspapers and for relaxing the present practice of setting forth in the indictment the address. As a chief ingredient in crimes of this class is a direction to the postal authorities to mail and deliver the article; as this direction is usually, if not invariably contained in a written instrument, i. e., the envelope or wrapper; as the established practice of skilled criminal pleaders is to set out this instrument or at least to aver that the article was addressed to persons known or unknown, it seems unwise and unjust to persons charged with offenses against the operations of the postoffice to countenance indictments in the present unprecedented form."

Citing:

Durland v. U. S., 161 U. S. 306, 314, 40 L. 709, 712.

In the Durland case it was held that the omission to state names and addresses was satisfied by the allegation, if true, that they are unknown.

The Brazeau case is referred to with approval in the celebrated case of

U. S. v. Green, 136 F. 641,

involving bribery of Government officials under Sec. 5451. There were very able counsel on both sides (Stanchfield, Collin and Tuthill) before District Judge

Ray, N. D. N. Y. He cites the Brazeau case in support of the proposition from

Hughes' Fed. Proc. p. 38,

where it is said:

> "In statutory offenses the language of the statute may be followed, but this does not dispense with the necessity of setting out the specific elements of the offense itself with sufficient definiteness to put the prisoner on his defense and to enable him to protect himself from a second prosecution."

Citing also:

U. S. v. Fero, 18 F. 901;
Peters v. U. S., 94 F. 127, 36 C. C. A. 105;
Cochran v. U. S., 157 U. S. 286, 39 L. 704;
U. S. v. Cruikshank, 92 U. S. 542, 23 L. 588.

The learned Judge Hawley, in

U. S. v. Harris, 122 F. 551,

refers to the Brazeau case and says: "The correctness of that opinion as applied to the facts of that particular case will not be questioned." The Harris case involved a non-mailable letter with no averment that it was enclosed in an addressed envelope, but the letter was set out and the address and the name of the addressee given.

Specification of Error No. 8.

Because the indictment is further defective in that it contains no averment that the newspapers were non-mailable; the indictment must charge specifically that the publication mailed was of the character declared

non-mailable by the statute, and it is not sufficient merely to set out a copy of such publication, leaving its non-mailable character to be inferred therefrom; nor is the defect cured by the conclusion, "contrary to the form of the statute."

U. S. v. Clifford, 104 F. 296, citing 2 Hawk, P. C., p. 323, Sec. 60;
State v. Foster, 3 McCord, 442;
Respublica v. Foyer, 3 Yeates, 451,

on the point that the want of direct allegation of anything material in the description of the substance, nature or manner of the crime cannot be supplied any intendment or implication whatsoever.

Specification of Error No. 9.

It is not averred in the indictment that defendants, or either of them, knew that the papers alleged to have been deposited by them in the postoffice contained indecent matter or knew its import, or that it was of a character tending to incite murder or assassination, nor any averment that the defendants, or either of them, were the owners or managers or editors or publishers of such papers from which it could be inferred that they knew the papers contained indecent matter or matter tending to incite murder or assassination.

U. S. v. Bebout, 28 F. 522;
U. S. v. Slenker, 32 F. 691;
U. S. v. Clifford, 104 F. 296.

In the Bebout case, Judge Wilken, in charging the jury, said: "To authorize a conviction of the defend-

ants it must be shown that they knew at the time that the paper contained the article or objectionable matter set out in the indictment. This knowledge is essential to constitute the offense. If they did not know that the matter described was in the paper, then the offense is not made out and they are entitled to an acquittal."

In the Slenker case Judge Paul, on motion in arrest of judgment, granted the motion and said: "The *scienter,* when necessary to be alleged in the indictment, is matter of substance, and not of form, and its omission is not cured by Sec. 1025.

The district attorney insists that as the indictment is in the language of the statute it is sufficient. This is the general rule as to sufficiency in describing the offense; but where something more is necessary, such as the allegation of guilty knowledge, then the language of the statute is not always sufficient. (The language of the statute is not used in this indictment.) This was the case in

U. S. v. Carll, 105 U. S. 611, 26 L. 1135,

where the indictment alleged in the words of the statute that the defendant feloniously and with intent to defraud did pass, utter and publish a falsely made, forged and counterfeited and altered obligation of the United States, but did not allege that the defendant knew it to be false, forged, counterfeited and altered. It was held insufficient after verdict, the Supreme Court saying:

> "In an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute, unless the words of themselves fully, di-

rectly and expressly, without any uncertainty or ambiguity, set forth all elements necessary to constitute the offense to be punished."

To the same effect is the decision in

U. S. v. Cruikshank, 92 U. S. 542, 23 L. 588.

The same objection made to this indictment was made and sustained in the case of

Com. v. Boynton, 12 Cush. 499.

These authorities are as high as any that can be invoked in the decision of this question. A very clear rule as to the sufficiency of an indictment is laid down in

Com. v. Young, 15 Grat. 664.

It is this:

"If the indictment may be true and still the accused may not be guilty of the offense described in the statute, the indictment is insufficient. Let us apply this rule to the case before us. The defendant is charged with knowingly depositing and causing to be deposited in the mail for mailing and delivery certain obscene papers. He may have knowingly done this, he may knowingly have caused it to be done, and yet be entirely ignorant of the obscene character of the writings, etc., so deposited, and consequently not guilty of the offense described in the statute. Knowingly in the indictment must be limited to the act of depositing for mailing and delivery of the obscene matter in the mail, and cannot be extended to include a guilty knowledge of the writings, papers, etc."

In the Clifford case, *supra,* the demurrer was sustained on two grounds,—no averment of non-mailability or of *scienter.* On the latter point Judge Jackson said:

> "The mere depositing of a paper is not of itself a violation of law. It is the depositing and mailing of a paper with knowledge of its contents, such as is described in the statute, which constitutes the violation of the law. The indictment should allege that when the defendant deposited the paper he knew of its contents and that it contained an article the mailing of which was inhibited by the statute. It does not necessarily follow that the depositing of a paper by the defendant renders him liable in the absence of guilty knowledge of its contents. If it is necessary to secure the conviction of a man for violation of this statute, by proof that the paper contained matter inhibited by the statute, then he should have notice of what the prosecution intended to prove by an allegation in the indictment that he well knew its contents, and that the paper contained matter forbidden by the statute to be mailed."

Judge Jackson then cites the case of

U. S. v. Reid, 73 F. 289,

where Judge Severens quashed the indictment under Sec. 3893, because it contained no averment of *scienter.* The learned Judge Severens thought the defect would probably be regarded as waived after verdict, but on motion to quash, lack of such allegation was fatal. He said:

> "It is undoubtedly an element of the offense prescribed by the statute that the party charged

must have known the character of the publication when it was deposited by him in the mail, and the ground of the present objection is that it is nowhere charged in this indictment that the respondent had such knowledge."

The last word on this point is contained in

Rosen v. U. S., 161 U. S. 29, 40 L. 607,

where Justice Harlan said:

"Undoubtedly the mere depositing in the mail of a writing, paper or other publication of an obscene, lewd or lascivious character is not an offense under the statute if the person making the deposit was at the time and in good faith without knowledge, information or notice of its contents."

In closing this phase of the discussion, and before proceeding to the final contention, we call attention to Specifications of Error Nos. 11 and 12 and 5 and 10.

Scienter, as herein discussed, necessarily comprehends intent, and intent is an element of the offense charged that it was "knowingly and wilfully" done. It was prejudicial error on the part of the trial judge not to permit the defendant Enrique Flores Magon to answer the questions as to whether he knew his paper to contain matter tending to incite murder or assassination or whether he intended to deposit in the mail indecent matter.

"Whenever the motive, intention or belief of a person is relevant to the issue it is competent for such person to testify directly upon that point. When the motive of a witness in performing a particular act becomes a material issue in a

cause or reflects important light upon such issue, he may himself be sworn in regard to it."

1 Jones Evidence, Sec. 167;
1 Bish. Crim. Proc., Sec. 1184;
Kerrains v. People, 69 N. Y. 101;
U. S. v. Stone, 8 F. 232;
12 Cyc. 403.

As to the extraordinary meaning attached by Congress to the word "indecent" by the amendment of March 4, 1911, it is only necessary to say that it is so whimsical, capricious, unreasonable and arbitrary that this Honorable Court ought to have no hesitation in saying that the enactment is nugatory and the amendment void. Such a definition altogether transcends the power of Congress, and is so uncontrolled by law, so unsanctioned by linguistic usage, so philologically impossible, and so opposed to the sound traditions of our mother tongue as to be void upon its face. The dictionaries give the synonyms of "indecent" as indelicate, immodest, gross, shameful, impure, indecorous, obscene, filthy, unbecoming, unseemly, improper, but no intimation of such a meaning as attached to the word by Congress.

Further, it may be said, apropos of Specification No. 10, that the great Lord Cockburn, having in mind that profound maxim that to the pure all things are pure, wisely observed that the test was whether the tendency of such matter was to deprave and corrupt the morals of those whose minds are open to such influences and into whose hands such matter may fall. There is no such allegation in the indictment and it is therefore

fatally defective on this point alone and the judgment should have been arrested.

Our courts have uniformly followed Lord Cockburn in construing Sec. 211 P. C. exclusive of the amendment of March 4, 1911.

III.

Did the Defendants Know or Could They Have Known That the Printed Matter Claimed in the Indictment to Be Non-Mailable Was "Indecent" or That It Was "of a Character Tending to Incite, in the Minds of Persons Reading the Same, Murder and Assassination" in the Language of the Indictment, or of a Character Tending to Incite Murder or Assassination in the Language of the Statute?

The defendants introduced in evidence the whole of the articles appearing in their paper Regeneracion, containing the alleged indecent matter,

[Tr. pp. 60 to 75, inclusive]

and the manifesto of the Mexican Liberal party,

[Tr. pp. 48 to 60, inclusive]

written and published September 23, 1911, by the defendants and others interested in the liberation of Mexico, for the purpose of showing the court and the jury that the defendants were engaged, as they conceived it, in the laudable endeavor to bring about some amelioration of the horrible social, industrial and political conditions in the country of their birth. This certainly is a laudable purpose. Patriots and lovers of liberty in all ages and in all lands have so labored.

The manifesto of September 23, 1911, is an historic document. It rings with lofty idealism. It urges the solidarity of the working class. It exhorts to unity of action. So do the articles as a whole containing the objectionable matter in the indictment. The question for the court to decide is whether such language is "indecent," i. e., tends to incite murder or assassination. If it is, then consistency requires that nearly every editor of the newspaper press in the United States be prosecuted. It would be easy to fill a hundred pages of this brief with recent instances of much more objectionable matter appearing in newspapers of high repute and big circulation. Many such have doubtless come to the attention of the members of this Honorable Court in the course of their reading the daily press. As I write I cull this from a daily paper of wide circulation published in Los Angeles:

"The preparedness that the nation demands and that Southern California especially needs is a preparation of cavalry, infantry and artillery to hurl back the conglomerated host of German reservists and Mexican bandits that threaten our southern frontier, and drive them below the south line of Chihuahua and Sonora and take the country and annex and rule it."

In 1525 the peasants of southern Germany rose against their rulers as the peasants of Mexico have been in revolt against their rulers for more than half a century. In that year Martin Luther wrote a pamphlet to encourage the revolt. He said:

"In the first place we have no one to thank for such disorder and rebellion but you, princes and lords,

and especially you blind bishops and crazy monks and priests, who, stubborn unto this day, have not ceased to rave and rage against the blessed Gospel, even though you know it is right and that you cannot refute it. Moreover, in your worldly offices you do nothing but skin and tax in order to keep up your pride and splendor, till the common man neither can nor will endure it longer. The sword is at your throats, yet you think you are so firm in the saddle that you cannot be unhorsed."

From that day to this such words, and others a thousand times more fiery, advising and justifying regicide, tyrannicide and resistance to tyranny, have lit the pages of history and inspired the hearts of men, and there is no historic case where the occasion or necessity for strong words has been greater than in the case of our sister republic. Mexico is one of the garden spots of earth. In minerals it is one of the world's rarest treasure houses. Here nature has been most beneficent. Her rulers have wrought her ruin. They have betrayed their trust, and Mexico lies torn and bleeding at the feet of those sworn to nurture and defend her. The land has been sold to the foreigner. The people have been robbed of their patrimony and despoiled and expropriated of all they possessed.

Millions of peons in Mexico have never known anything but oppression by the ruling class, exploitation by the capitalist class and persecution by the church—that sombre trinity referred to in the evidence in this case as capital, authority and the clergy, notwithstand-

ing the prodigality of nature in Mexico and the best Constitution ever writtten.

The cry for justice died on the lips of millions and was only made audible to the ear of humanity by the protests of such men as these defendants, who dared the powers that bound them, defied authority and languished and died in jail and on the gibbet that Mexico might be free. The land question lies at the base of Mexico's troubles. As early as 1856 the Mexican Congress passed the most advanced land law ever formulated. It declared: The right of property in land consists in the occupation or possession of land, and these legal requisites cannot be conferred unless the land be worked and made productive. The accumulation in the hands of a few people of large territorial possessions which are not cultivated or made productive is against the common welfare and contrary to the principles of democratic and republican government. The next year this liberal land law was embodied in the most advanced constitution ever adopted by any people in the history of the world, written by an Indian and received with acclamation by the common people. It guaranteed: "To every man as much land as he can make productive." It said: "The Mexican people recognize that the rights of men are the foundation and the purpose of social institutions; every one is born free; none shall be compelled to work without his consent or without just compensation, nor contract away, curtail or lose his liberty; the press, speech and education shall be free: monastic orders are not permitted; no church nor re-

ligious institution nor minister of any cult shall have legal capacity to acquire or hold or manage any land, nor shall any religion be established or recognized by Congress."

The church opposed the Constitution and this land policy. The people were commanded by the church "not to obey the government, but to work against it by all possible means," for it was said "such a government represented the enemies of religion, who were attacking the independence and sovereignty of the church, trying to subdue her temporal power, dispossessing her of her property and compelling her, with imprisonment and exile, to bow before an idol raised up by impiety." The church declared to the people that it was not lawful to swear allegiance to the Constitution, because it was contrary to the doctrines of the church. Those who had taken the oath of allegiance to the government of the Constitution were required to retract such oath at the confessional and to make such retraction public and to notify the government of their action. The Pope issued a bull deploring the curtailment of the church's privileges and said:

"We make known to the faith in Mexico and to the Catholic universe that we energetically condemn every decree that the Mexican government has enacted against the Catholic religion, against the church and her sacred ministers and pastors, against her laws, rights and property, and also against the authority of the Holy See. We raise our pontifical voice with apostolic freedom before you to condemn, reprove and declare null and void and without any value the said

decrees and all others which have been enacted by the civil authorities in such contempt of the ecclesiastical authority of this Holy See and with such injury to religion, to the sacred pastors and illustrious men."

Progress and reaction here met face to face, each a challenge to the other, and Mexico has been torn and bleeding ever since in consequence. The church taught the people to spit upon the law and upon this splendid Constitution and to trample it beneath their feet. Throughout the trial counsel for the government at every opportunity thrust it into the case that the defendants are anarchists. Pray who taught the people of Mexico anarchy? Who taught them to spurn their Constitution and to defy the civil authorities? Let the church and Zuloaga and Miramon and Diaz answer.

And the hostility of the church to the civil institutions of Mexico has not abated in all the years of strife. There is the same fierce opposition on the part of the clergy to the liberal Constitution and to the liberal element in the government that there has always been.

In 1820 the church property in Mexico was $45,000,000, according to an article in the New York Evening Mail of April 9, 1917, over the signature of Monsignor Kelley and endorsed by Archbishop Ireland. Speaking of a portion of the middle class upon whom he would lay the blame for Mexico's ills, he says:

"In reality these are either members of the Latinized Masonic lodges or people who follow the lead of such

lodges. Some of them are Socialists, always of the bitterest kind; some are out-and-out anarchists. They make up in noise what they lack in numbers. They have at different times, through agitation among the lowest class, imposed themselves and their opinions upon the entire middle class, of whom they form a very small proportion. * * * Government is always in the hands of a small political section of the middle class, absolutely unfitted for holding power, since their education consists of half-formed theories based chiefly on the ideals of the French revolution. * * *

"We know that man fighting against man often becomes a sort of human brute; but quite often, too, becomes more merciful and humane than the onlookers. In Mexico, home of the most ghastly spectacle of all time, it is not man who fights against man. It is man who fights against God, against all that religion means to a people. In Mexico there is on the fight of hell against heaven."

Since this case was tried there has been published an illuminating book, "The Whole Truth About Mexico," by Francisco Bulnes, for thirty years a representative and senator in the Congress of Mexico. Briefly summarized, this remarkable book makes the following indictment against the rulers of Mexico and against American and English capitalists:

1. Selling half of Lower California for a mere pittance to Louis Huller, of German extraction and a naturalized American citizen, who passed it on to an American colonizing enterprise.

2. The government gave its consent to changes in the mining code, for no other reasons than that of enriching the grantees of unclaimed lands in the state of Coahuila, who had acquired the Sabina lands for an insignificant sum with a view of selling them to the American multimillionaire, Huntington.

3. Selling, for next to nothing, 7,400,000 acres of excellent lands in the state of Chihuahua to two favorites of the Mexican government, that they might resell to Hearst, the millionaire newspaper publisher, who constantly conspired against the integrity of Mexican territory so as to bring about armed intervention.

4. Granting concessions to foreign companies to exploit the oil lands, among which companies the American predominated; granting them also exemption from export duties on the crude or refined product.

5. The most scandalous of all the oil concessions was that granted by the dictatorship to Lord Cowdray, an English capitalist. Lord Cowdray was intimately associated with ex-President Taft's administration, as his brother, Henry W. Taft, and George Wickersham, attorney general in the Taft cabinet, were directors in the Pearson company, organized and presided over by Lord Cowdray.

6. Permitting the Guggenheims to monopolize almost completely the important metallurgic industry. The Guggenheims controlled the smelting plants of Monterey, San Luis Pottosi, Aguascalientes and Velardena, in Durango, and were getting a foothold in Pachuca and Real del Monte.

7. Granting to Col. Greene, an American citizen, enormous concessions in the copper lands of the state of Sonora, upon which he established the famous Cananea plant, where 4,000 employes were treated like slaves, and with such inhumanity that there was an uprising among them, with the result that armed men from the United States passed into Mexican territory to protect American oppressors.

8. Permitting United States Ambassador Thompson to enter the business field in Mexico, something that would not have been tolerated in any other country, and granting him personal concessions by means of which he organized the United States Banking Company and the Pan-American Railroad.

9. The arrangement by the noted Cientifico lawyer, Sr. Joaquin Casasus, of the scandalous concessions in the rubber lands in Durango granted to the American multimillionaires John D. Rockefeller and Nelson Aldrich.

10. The verbal arrangement between Senor Limantour, the leader of the Cientificos, and Mallet-Prevost, lawyer of the Tiahualilo Company, of an agreement which ruined the river bank dwellers, both great and small, of the Nazas river, in the cotton region of the "Laguna," who were for the most part Mexicans; and, moreover, the grant of several millions indemnity to the Tiahualilo Company for fake damages.

11. Selling, for a nominal sum, 124,000,000 acres of marvelously fertile lands to 28 favorites, who sold them at very low prices to the foreign companies, mostly Americans, as it was the latter's ambition to

buy up the country by bits, and finally realize the boasted "pacific conquest."

12. Having despoiled the Yaquis, brave and indomitable as the Araucanians, of their magnificent lands, to hand them over to thieving bureaucrats, who wanted them merely to sell to American investors.

13. Despoiling various towns in the state of Mexico of their magnificent wooded hills, in order to favor an American and Senor Jose Sanchez Romos, a Spaniard, proprietors of the paper factories of San Rafeal and Anexas.

14. Permitting the banking house of Scherer-Limantour, in combination with American railroad magnates, to buy secretly and at a low figure the stocks of the Mexican Central, the National, the Internation, the Pan-American, and other railroads, to sell them later, at a great advance, to the Mexican government.

15. The complete prostitution of the judicial system, which dictated that in case a foreigner was in litigation with a Mexican the case had to be decided in favor of the foreigner, whether he were right or wrong, without making the Mexican pay the costs; but if the foreigner were an American, his Mexican opponent was obliged to pay the costs of suit.

Is not that an amazing revelation of conditions in Mexico by one in a position to know? And no one has challenged the truth of the statements in this remarkable book. Is there no ground for resentment and anger and indignation against the despoilers of such a splendid country?

The offenses charged against the defendants involve no moral turpitude. Their protests were directed against the tyrants of Mexico.

It is always in order for the people to get rid of tyrants. The greatest men in all ages have justified regicide. John Milton said:

"It is lawful, and has been held so through all ages, for any who have the power, to call to account a tyrant or wicked king, and, after due conviction, to depose and put him to death if the ordinary magistrates have neglected to do it."

Theodore Roosevelt, in his "Life of Cromwell," says: "The best men in England approved the execution of the king, not only as a work of necessity, but as right on moral grounds.

"Two weeks after the execution, Milton—perhaps the loftiest soul in the whole Puritan party, full though it was of lofty souls—wrote his pamphlet justifying the right of the nation to depose, or, if need be, execute tyrants and wicked kings. His arguments never have been, and never can be, successfully controverted on grounds of justice and morality."

Wendell Phillips, in speaking on Nihilism in Russia, said, and it goes freely through the mails:

"One might tremble for the future of the race if such despotism could exist without provoking the bloodiest resistance. Honor Nihilism, since it redeems human nature from the suspicion of being utterly vile, made up only of the heartless oppressors and contented slaves. Every line of our history, every interest of

civilization, bids us rejoice when the tyrant grows pale and the slave rebellious. We cannot but pity the suffering of any human being, however richly deserved, but such pity must not confuse our moral sense. Humanity gains."

Shortly after the world war broke out in Europe, Bernard Shaw, the greatest intellectual force of his time, said, and he spread the saying broadcast through our mails and wherever the English language is spoken: "The way to end this war is for you soldiers to shoot your officers and go home."

Freedom of the Press.

We come lastly to a brief consideration of the question as to whether or not public policy sanctions such a prosecution as this—whether Congress ought, even if it has the power, which we deny, to forbid the use of the mails to propaganda that cannot under the first amendment be otherwise suppressed.

Dr. Benjamin Rush was one of the signers of the Declaration of Independence, and, until his death, treasurer of the United States mint. In 1778 he was a member of the Pennsylvania convention to adopt the federal Constitution, when he said concerning the postoffice:

"For the purpose of diffusing knowledge, as well as extending the living principle of government to every part of the United States, every state, city, county, village and township in the Union should be tied together by means of the postoffice. This is the true

non-electric wire of government. It is the only means of conveying heat and light to every individual in the federal commonwealth. 'Sweden lost all her liberties,' says the Abbe Raynal, 'because her citizens were so scattered that they had no means of acting in concert with each other.' It should be a constant injunction to the postmasters to convey the newspapers free of all charge for postage. They are not only the vehicle of knowledge and intelligence, but the sentinels of the liberties of our country."

Freedom to advocate revolution is the best way to avoid all unnecessary revolution. In 1774 the Continental Congress, in an address to the inhabitants of Quebec, said:

"The last right we shall mention regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officials are shamed or intimidated into more honorable or just modes of conducting affairs."

In 1786 Thomas Jefferson drew a legislative resolution to insure religious toleration in Virginia. It reads:

"To suffer the civil magistrate to intrude his power into the field of opinion, or to restrain the profession or propagation of principles, on supposition of their ill tendency, is a dangerous fallacy which at once destroys all liberty, because he, being of course judge of that

tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own.

"IT IS TIME ENOUGH FOR THE RIGHTFUL PURPOSE OF CIVIL GOVERNMENT FOR ITS OFFICIALS TO INTERFERE WHEN PRINCIPLES BREAK OUT INTO OVERT ACTS AGAINST PEACE AND GOOD ORDER."

Reynolds v. U. S., 98 U. S. 163, 25 L. 249.

In 1787, Jefferson, in a letter to James Madison, said:

"I hold that a little rebellion now and then is a good thing, and as necessary in the political world as a storm is in the physical . * * * An observation of this truth should render honest republican governors so mild in their punishment of rebellions as not to discourage them too much. It is a medicine necessary for the sound health of government."

And in 1792 Jefferson wrote to Stephen Smith:

"Can history produce an instance of rebellion so honorably conducted (referring to Shay's rebellion)? I say nothing of its motives; they were founded in ignorance, not wickedness. God forbid that we should ever be twenty years without such a rebellion. * * * What country before ever existed a century and a half without a rebellion, and what country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms. The remedy is to set them right as to facts; pardon and pacify them. What signify a few lives lost in a century or two? The tree

of liberty must be refreshed from time to time with the blood of patriots and tyrants."

Erskine was the greatest lawyer of his time. In the Frost case he said:

"It is easy to distinguish where the public duty calls for the violation of the private one; criminal intention, but not indecent levities, not even grave opinions unconnected with conduct, are to be exposed to the magistrate.

"Constructed by man to regulate human infirmities, and not by God to guard the purity of angels, it (the venerable law of England) leaves to us our thoughts, our opinions and our conversations, and punishes only overt acts, of contempt and disobedience to her authority. Gentlemen, this is not the specious phrase of an advocate for his client, it is not even my exposition of the spirit of our Constitution; but it is the phrase and letter of the law itself."

And in Parliament he once said:

"When men can freely communicate their thoughts and their sufferings, real or imaginary, their passions spend themselves in air, like gunpowder scattered upon the surface;—but pent up by terrors, they work unseen, burst forth in a moment, and destroy everything in their course. Let reason be opposed to reason, and argument to argument, and every good government will be safe."

The Rev. Robert Hall has a high standing in the literature of free speech. He said:

"The law hath amply provided against overt acts

of sedition and disorder, and to suppress mere opinions by any other method than reasoning and argument is the height of tyranny. Freedom of thought being intimately connected with the happiness and dignity of man in every stage of his being, is of so much more importance than the preservation of any Constitution, that to infringe the former under pretense of supporting the latter, is to sacrifice the means to the end."

Sir Leslie Stephen was one of the greatest men produced by England in the nineteenth century. He said:

"The doctrine of toleration requires a positive as well as a negative statement. It is not only wrong to burn a man on account of his creed, but it is right to encourage the open avowal and defense of every opinion sincerely maintained. Every man who says frankly and fully what he thinks, is so far doing a public service. We should be grateful to him for attacking most unsparingly our most cherished opinions. * * * Toleration, in fact, as I have understood it, is a necessary correlative to a respect for truthfulness. So far as we can lay it down as an absolute principle that every man should be thoroughly trustworthy and therefore truthful, we are bound to respect every manifestation of truthfulness. * * *

"A man must not be punished for openly avowing any principles whatever. * * * Toleration implies that a man is to be allowed to profess and maintain any principles that he pleases; not that he should be allowed in all cases to act upon his principles, especially to act upon them to the injury of others. No

limitation whatever need be put upon this principle in the case supposed. I, for one, am fully prepared to listen to any arguments for the propriety of theft or murder, or if it be possible, of immorality in the abstract. No doctrine, however well established, should be protected from discussion. The reasons have been already assigned. If, as a matter of fact, any appreciable number of persons are so inclined to advocate murder on principle, I should wish them to state their opinions openly and fearlessly, because I should think that the shortest way of exploding the principle and of ascertaining the true causes of such a perversion of moral sentiment. Such a state of things implies the existence of evils which cannot be really cured till their cause is known, and the shortest way to discover the cause is to give a hearing to the alleged reasons."

The fight for free speech is ever on. Congress is wrestling with a gag law now. Senator Borah the other day said:

"Without liberty of speech all the outward forms and structure of free institutions are a sham—a pretense—the sheerest mockery. If speech is not independent and untrammeled; if the mind is shocked or made impotent through fear, it makes no difference under what form of government you live, you are a subject, and not a citizen."

"The words of the Constitution should be given the meaning they were intended to bear when the instrument was framed."

Scott v. Sandford, 19 How. 393, 15 L. 691.

"It is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts that the enforcement of those constitutional provisions intended to secure equality of right, which is the foundation of free government."

Gulf etc. Ry. Co. v. Ellis, 165 U. S. 160, 41 L. 670.

And for this purpose it is well to remember the utterances for free speech made by the great men of Revolutionary times.

At Boston, in 1773, Dr. Benjamin Church said:

"The constitution of a magistrate does not, therefore, take away that lawful defense against force and injury allowed by the law of nature. * * * As a despotic government is evidently productive of the most shocking calamities, whatever tends to restrain such inordinate power, though in itself a severe evil, is extremely beneficial to society; for where a degrading servitude is the detestable alternative, who can shudder at the reluctant poignard of a Brutus, the crimsoned axe of a Cromwell, or the reeking dagger of a Ravillac."

In 1777 a distinguished lawyer, Benjamin Hitchborn, in a speech at Boston, said:

"I define civil liberty to be, not 'a government by laws,' made agreeable to charters, bills of rights or compacts, but a power existing in the people at large, at any time, for any cause, or for no cause but their own sovereign pleasure, to alter or annihilate both the

mode and essence of any former government, and adopt a new one in its stead."

Is it not apparent that the defendants in all their written articles brought to the attention of the court in this case were engaged in legitimate efforts, with commendable zeal and with such ability and wisdom as they could command, to bring about a better social condition in the land of their birth?

On the subject of free speech and industrial unrest, the United States Commission on Industrial Relations has this to say at page 150 of the final report:

"One of the greatest sources of social unrest and bitterness has been the attitude of the police toward public speaking. On numerous occasions in every part of the country the police of cities and towns have either arbitrarily, or under the cloak of a traffic ordinance, interfered with or prohibited public speaking, both in the open and in halls, by persons connected with organizations of which the police or those from whom they received their orders did not approve. In many instances such interference has been carried out with a degree of brutality which would be incredible if it were not vouched for by reliable witnesses. Bloody riots frequently have accompanied such interference and large numbers of persons have been arrested for acts of which they were innocent, or which were committed under the extreme provocation of brutal treatment of police or private citizens.

In some cases this suppression of free speech seems to have been the result of sheer brutality and wanton mischief, but in the majority of cases it undoubtedly is

the result of a belief by the police, or their superiors, that they were "supporting and defending the government" by such an invasion of personal rights. There could be no greater error. Such action strikes at the very foundations of government. It is axiomatic that a government which can be maintained only by the suppression of criticism should not be maintained. Furthermore, it is the lesson of history that attempts to suppress ideas results only in their more rapid propagation.

Not only should every barrier to the freedom of speech be removed, as long as it is kept within the bounds of decency and as long as the penalties for libel can be invoked, but every reasonable opportunity should be afforded for the expression of ideas and the public criticism of social institutions. The experience of Police Commissioner Woods of New York city, as contained in his testimony before this commission, is convincing evidence of the good results which follow such a policy. Mr. Woods testified that when he became commissioner of police he found in force a policy of rigid suppression of radical street meetings, with the result that riots were frequent and bitter hatred of the police was widespread. He adopted a policy of not only permitting public meetings at all places where traffic and the public convenience would not be interfered with, but instructing the police to protect speakers from molestation; as a result, the rioting entirely ceased, the street meetings became more orderly and the speakers were more restrained in their utterances."

One of the most powerful pleas ever made for free speech was written by the great constitutional lawyer, John Louis De Lolme, in 1773. He said:

"It is with respect to the right of an ultimate resistance that the advantage of a free press appears in a most conspicuous light. As the most important rights of the people, without the prospect of a resistance which overawes those who should attempt to violate them, are little more than mere shadows, so the right of resisting, itself, is but vain when there are no means of effecting a general union between the different parts of the people. Private individuals, unknown to each other, are forced to bear in silence injuries in which they do not see other people take a concern. Left to their own individual strength they tremble before the formidable and ever ready power of those who govern; and as the latter well know (and are even apt to overrate) the advantages of their own situation, they think they may venture on anything. But when they see that all their actions are exposed to public view,—that in consequence of the celerity with which all things become communicated, the whole nation forms, as it were, one continued irritable body, no part of which can be touched without exciting an universal tremor,—they become sensible that the cause of each individual is really the cause of all, and that to attack the lowest among the people is to attack the whole people. In short, as the body of the whole people can not act without either subjecting themselves to some power, or effecting a general destruction, the only share they can have in a government, with advantage to themselves,

is not to interfere, but to influence—to be able to act, and not to act. The power of the people is not when they strike, but when they keep in awe; it is when they can overthrow everything, that they never need to move; and Manlius included all in four words, when he said to the people of Rome,—*Ostendite bellum, pacem habebitis.*"

Is it not a laudable purpose to try with pen and voice to ameliorate the social and political ills of distracted Mexico? Can it be said the defendants had any other purpose? Can it be said that their words under such conditions were intended by them to incite murder and assassination? Can it be said they must have known that their words would tend to incite murder and assassination? Did they not have before them on many a page of human history the example of thousands of patriots and lovers of liberty in every land to lead them to believe they were justified in using strong language in their endeavors to point out the way of escape from an intolerable tyranny in our sister republic? Shall they not be judged by their motives and by the humane and lofty spirit apparent in every line? When so judged we are impelled to the conclusion that they have written their names imperishably on the scroll of history as among those who loved their fellow-men and among those who have suffered and died that freedom should not perish from the earth.

In closing we cannot do better than to quote the powerful argument of the illustrious James Mill, the father of his even more illustrious son, John Stuart

Mill, written in 1821, on the liberty of the press. He said:

"Exhortations to resist all powers of government at once should not be considered offenses. Unless a door is left open to resistance of government, in the largest sense of the word, the doctrine of passive obedience is adopted; and the consequence is, the universal prevalence of misgovernment ensnaring the misery and degradation of the people. On the other hand, unless the operations of government, instituted for the protection of rights, are secured from obstruction, the security of rights, and all the advantages dependent upon the existence of government, are at an end. Between these two securities, both necessary to obtain the benefits of good government, there appears to be such a contrariety that the one can only be obtained by the sacrifice of the other. * * *

"The application of physical force which is treated as an evil is clearly distinguishable from that resistance of government which is the last security of the many against the misconduct of the few. * * *

"It is resistance to all the powers of government at once, either to withdraw them from the hands in which they have hitherto been deposited, or greatly to modify the terms upon which they are held. * * *

"We think it may be satisfactorily shown that no operation of the press, however directly exhorting to this species of resistance, ought to be treated as an offense.

"The reason is, that no such exhortation can have any immediate or formidable effect; can, indeed, have

any effect at all, except through such a medium as ought to be, at all times perfectly free. Suppose that a work is published, exhorting the people in general to take arms against the government, for the purpose of altering it against the consent of its rulers. The people cannot take arms against the government without the certainty of being immediately crushed, unless there has been already created a general consent. If this consent exists in such perfection as to want nothing to begin action but an exhortation, nothing can prevent the exhortation, and forbidding it is useless. If the consent does not exist in nearly the last degree of perfection, a mere exhortation, read in print, can have no effect which is worth regarding. In all circumstances, therefore, it is useless, and consequently absurd, to treat this species of exhortation as an offense. If, on the other hand, it were clearly recognized that every man had a license to exhort the people to a general resistance of government, all such exhortations would become ridiculous, unless on those rare and extreme occasions on which no prohibitions and no penalties can or ought to prevent them. * * *

"We think it will appear, with sufficient evidence, that in the way of indirect exhortations to resistance, that is, in laying the grounds of dissatisfaction with the government, there is no medium between allowing everything and allowing nothing; that the end, in short, which is sought to be gained by allowing anything to be published in censure of the government, cannot be obtained without leaving it perfectly free to publish everything.

"The end which is sought to be obtained, by allowing anything to be said in censure of the government, is, to ensure the goodness of the government; the most important of all the objects, to the attainment of which, the wisdom of man can be applied. If the goodness of government could be ensured by any preferable means, it is evident that all censure of the government ought to be prohibited. All discontent with the government is only good in so far as it is a means of removing real cause of discontent. If there is no cause, or if there is better means of removing the cause, the discontent is, of course, an evil and that which produces it an evil.

"So true it is, however, that the discontent of the people is the only means of removing the defects of vicious governments, that the freedom of the press, the main instrument of creating discontent, is, in all civilized countries, among all but the advocates of misgovernment, regarded as an indispensable security, and the greatest safeguard of the interests of mankind.

"For what is meant by a vicious government? or wherein do the defects of government consist? Most assuredly they all consist in sacrificing the interests of the many to the interests of the few. The small number in whose hands the powers of government are, in part directly, in part indirectly, placed, cannot fail, like other men, to have a greater regard for what is advantageous to themselves, than what is advantageous to other men. They pursue, therefore, their own advantage, in preference to that of the rest of the community. That is enough. Where there is nothing to

check that propensity, all the evils of misgovernment, that is, in one word, the worst evils by which human nature is afflicted, are the inevitable consequence.

"There can be no adequate check without the freedom of the press. The evidence of this is irresistible. In all countries the people either have a power legally and peaceably of removing their governors, or they have not that power. If they have not that power, they can only obtain very considerable ameliorations of their governments by resistance, by applying physical force to their rulers, or, at least, by threats so likely to be followed by performance, as may frighten their rulers into compliance. But resistance, to have this effect, must be general. To be general, it must spring from a general conformity of opinion, and a general knowledge of that conformity. How is this effect to be produced, but by some means, fully enjoyed by the people, of communicating their sentiments to one another? Unless where the people can all meet in general assembly, there is no other means, known to the world, of attaining this object, to be compared with the freedom of the press.

"This requires the use of the cheapest means of communication, and, we add, the free use of those means.

"To impose any restraint upon the liberty of the press is undoubtedly to make a choice. If the restraint is imposed by the government, it is the government that chooses the directors of the public mind. If any government chooses the directors of the public mind, that government is despotic.

"If you say that no man is to pass an unjust censure upon the government, who is to judge? It is surely unnecessary to repeat the proof of the proposition that there is nobody who can safely be permitted to judge. The path of practical wisdom is as clear as day: All censures must be permitted equally; just and unjust.

"We have then arrived at the following important conclusions,—that there is no safety to the people in allowing anybody to choose opinions for them; that there are no marks by which it can be decided beforehand what opinions are true and what are false; that there must, therefore, be equal freedom of declaring all opinions, both true and false; and that, when all opinions, true and false, are equally declared, the assent of the greater number, when their interests are not opposed to them, may always be expected to be given to the true. These principles, the foundation of which appears to be impregnable, suffice for the speedy determination of every practical question.

"That the people ought, therefore, to know the conduct of their judges, and when we say judges we mean every other functionary, and the more perfectly the better, may be laid down as indubitable. They are deprived of all trustworthy means of knowing, if any limit whatsoever is placed to the power of censure.

"Freedom of discussion means the power of presenting all opinions equally, relative to the subject of discussion; and of recommending them by any medium of persuasion which the author may think proper to employ. If any obstruction is given to the delivering

of one sort of opinions, not given to the delivering of another; if any advantage is attached to the delivering of one sort of opinions, not attached to the delivery of another; so far equality of treatment is destroyed, and so far the freedom of discussion is infringed; so far truth is not left to the support of her own evidence; and so far, if the advantages are attached to the side of error, truth is deprived of her chance of prevailing.

"The question is, whether indecent discussion should be prohibited? To answer this question we must, of course, inquire what is meant by indecent.

"In English libel law, where this term holds so distinguished a place, is it not defined?

"English legislators have not hitherto been good at defining; and English lawyers have always vehemently condemned and grossly abused it. The word 'indecent,' therefore, has always been a term under which it was not difficult, on each occasion, for the judge to include whatever he did not like. 'DECENT' AND 'WHAT THE JUDGE LIKES' HAVE BEEN PRETTY NEARLY SYNONYMOUS.

"If I say that such a judge, on such an occasion, took a bribe and pronounced an unjust decision which ruined a meritorious man and his family, this is a simple declaration of opinion, and ought not, according to the doctrine already established, to meet with the smallest obstruction. If I also state the matter of fact with regard to myself, that this action has excited in me great compassion for the injured family, and great anger and hatred against the author of

their wrongs, this must be fully allowed. I must further be allowed to express freely my opinion, that this action ought to excite similar sentiments in other members of the community, and that the judge ought to receive an appropriate punishment. Much of all this, however, I may say in another manner. I may say it much more shortly by implication. Here, I may cry, is an act for the indignation of mankind! Here is a villain who, invested with the most sacred of trusts, has prostituted it to the vilest of purposes! Why is he not an object of public execration? Why are not the vials of wrath already poured forth upon his odious head? All this means nothing but that he has committed the act; that I hate him for it, and commiserate the sufferers; that I think he ought to feel as I do. It cannot be pretended that between these two modes of expression the difference, in point of real and ultimate effect, can be considerable. For a momentary warmth the passionate language may have considerable power. The permanent opinion formed of the character of the man, as well as the punishment which, under a tolerable administration of law, he can sustain, must depend wholly upon the real state of the facts; any peculiarity in the language in which the facts may have been originally announced soon loses its effect.

"You cannot forbid the use of passionate language without giving a power of obstructing the use of censorial language altogether. The reason exists in the very nature of language. You cannot speak of moral acts in language which does not imply approbation and

disapprobation. All such language may be termed passionate language. How can you point out a line where passionate language begins, dispassionate ends? The effect of words upon the mind depends upon the associations which we have with them. But no two men have the same associations with the same words. A word which may excite strains of emotion in one breast will excite none in another. A word may appear to one man a passionate word which does not appear so to another. Suppose the legislature were to say that all censure conveyed in passionate language shall be punished, hardly could the vices of either the functionaries or the institutions of government be spoken of in any language which the judges might not condemn as passionate language, and which they would not have an interest, in league with other functionaries, to prohibit by their condemnation. The evil, therefore, which must of necessity be incurred by a power to punish language to which the name of passionate could be applied, would be immense. The evil which is incurred by leaving it exempt from punishment is too insignificant to allow that almost anything should be risked for preventing it."

May it not be that the defendants, in what they wrote and for which they have suffered many months in jail awaiting trial, had no thought of aught except to help their brothers in Mexico gain something more of freedom and something more for themselves of the good things that country so bounteously produces?

May it not be that they saw the goal but did not know the road? May it not be that their love was

greater than their discretion? May it not be that they had no strength to wait for Mexico's redemption, but only strength to make such protest as they could with the only weapons they had—the pen and the printing press? They have been in prison before for the cause of Mexico, and they are not afraid to go to prison again for the cause of land and liberty to which they have dedicated their lives, but we beg of this Honorable Court to consider well their case, and to consider well whether the cause of justice will not best be served by reversing the judgment herein and discharging the accused.

We close with the following lines written by a lover of Irish freedom shortly after the execution of those devoted sons of Ireland who participated in the Dublin revolt. These powerful lines by an unknown poet are not inapropos to the case of the defendants:

Pray every man in his abode
And let the church bells toll,
For those who did not know the road,
But only saw the goal.

Let there be weeping in the land,
And charity of mind
For those who did not understand,
Because their love was blind.

Their errant scheme that we condemn,
All perished at a touch;
But much should be forgiven them
Because they loved much.

Let no harsh tongue applaud their fate,
Or their clean names decry;
The men who had no strength to wait,
But only strength to die.

Come all ye to their requiem,
Who gave all men can give,
And be ye slow to follow them,
And hasty to forgive.

And let each man in his abode,
Pray for each dead man's soul,
Of those who did not know the road,
But only saw the goal.

It is respectfully submitted that the verdict and judgment should be set aside and the defendants discharged.

J. H. Ryckman,
Attorney for the Plaintiffs in Error.